IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.40 OF 2006

Shivmaruti Shankar Nanadikar & Ors. ...Appellants
Vs.
Smt. Bahuban Manilal Shah & Ors. ...Respondents

Mr A.M. Joshi for the Appellants.
Mr Amit Borkar for the Respondents.

CORAM : A. S. OKA, J.

DATE : MARCH 31, 2006.

JUDGMENT:

1. The submissions of the Advocates appearing for the parties were heard day before yesterday and today the Appeal is kept for dictation of judgment. The Appellants are the original Defendants and the Respondents are the original Plaintiffs. The case of the Respondents-Plaintiffs in short is that one Manilal Shankarlal Shah, deceased husband of the Respondent No.1 and father of the Respondent No.2 was the tenant in respect of the suit premises which are owned by the Appellants. The case of the Respondents is that the Appellants dispossessed them in May 1999. Therefore, the suit for possession was filed. The Trial Court decreed the suit and the Appellate Court has confirmed the said decree.

2. Shri Joshi, learned Counsel appearing for the

Appellants submitted that the suit filed by the Respondents was bad in law because of multifariousness. He submitted that in the suit reliefs were prayed for which could have been granted by two different courts having independent jurisdiction, namely, Civil Court and the Competent Court under the provisions of the Bombay Rents, Hotels and Lodging House Rates Control Act, 1947. He relied upon decision of this Court in the case of **Mohmad Husain Chotumiya Shaikh Vs. Taraben Manilal Shah reported in 1992 Bombay Rent Cases 41.** Shri Joshi further submitted that the suit is not properly valued for the purposes of jurisdiction and court fees. He submitted that suit filed containing only a prayer for mandatory injunction was not maintainable especially when the Respondents had admitted that they lost possession.

3. I have considered the submissions. It is pertinent to note here that the written statement filed by the Appellants is merely of denials. It is specifically admitted in the written statement that late Manilal Shah was the tenant in respect of the suit premises. During the course of hearing of the suit a case was sought to be made out by the Appellants that in the year 1997 the tenancy rights

have been surrendered. The Appellate Court after noting that the relationship between the parties was not at all cordial has held that there is absolutely no evidence of surrender of tenancy. The Appellate Court has observed that not only that any document showing the surrender is not produced, but even possession receipt is not produced by the Appellants. Therefore, the court has disbelieved the case of the Appellants of surrender of tenancy. It is also brought on record that the Appellants had earlier filed a suit for eviction on various grounds which was dismissed.

4. The Respondents claim mandatory injunction on the ground that they were in possession and they have been illegally dispossessed. Once the courts below came to the conclusion that there was no evidence of termination of tenancy either by original tenants or by the Appellants, the Respondents were entitled to restoration of possession. In my view, there is no error in the decrees passed by the courts below. As far as issue of jurisdiction urged by Shri Joshi is concerned, it must be noted here that submission was made on behalf of the Appellants in the courts below that a suit under section 6 of the Specific Relief Act, 1963 ought to have been filed by the Respondents.

According to me Shri Joshi cannot contend that the suit was governed under section 28 of the said Act of 1947 as admittedly on that footing the Respondents filed a Writ Petition under Article 227 of the Constitution of India for challenging the impugned judgments and decrees and the said Writ Petition was withdrawn at the instance of the Appellants on 07th December, 2005 with liberty to file appropriate proceedings. On the basis of liberty granted by this Court, the present Second Appeal has been preferred. It is obvious that now the Appellants cannot contend that the suit was governed by Act of 1947 because if the said contention is accepted, the Second Appeal itself will not be maintainable.

5. In so far as contention regarding incorrect valuation of the suit raised by Shri Joshi is concerned, I find that the said contention was not raised in the first Appellate Court. Hence, such contention cannot be allowed to be raised in Second Appeal.

6. Shri Joshi appearing for the Appellants tried to submit that the Respondents have not made out a case that they were entitled to inherit the tenancy under section 5(11)(c) of the said Act of 1947. The

said submission has no merit as it is not disputed that the Respondents are the legal representatives of the original tenant being the widow and son respectively of the original tenant.

7. There is no merit in the Second Appeal. Second Appeal is dismissed with no orders as to costs.

JUDGE